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Supreme Court, U.S.
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In The

# Supreme Court of the United States

CELLULAR PHONE TASKFORCE,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1. FUNCTIONAL COMPLIANCE. Respondents take the self-contradictory position that, while the Executive Branch as a matter of policy would limit use of the functional compliance doctrine to the EPA, this need not be a matter for the court's concern because "No federal regulation or statute, or other source of law prohibits the application of the functional compliance test to agencies other than the EPA." Respondents do, at least, acknowledge that cases which have considered the matter "either declined to apply the test to a particular agency or stated in dictum that the test applied only to EPA." Nevertheless, because the repeated statements of those courts could arguably be considered not a part of the holding of those cases, "There is thus no conflict." Brief for the Respondents in Opposition (hereafter, "Opposition"), at 17.

The very fact that respondents have made this argument – we like it as a policy but, gosh, we'll ignore it here – makes clear the need for this court to grant certiorari.

First, respondents have misstated the law. NEPA compels all federal agencies to satisfy its requirements absent clear and unavoidable conflict in statutory authority. *Flint Ridge Dev't Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787-788, 96 S.Ct. 2430, 49 L.Ed.2d 205 (1976); 42 U.S.C. § 4332.

Second, a plain reading of the cases reveals that when the courts have been persuaded to carve out an exception to the unambiguously strict compliance mandated by NEPA, this narrow exception is based on an express statutory conflict which would otherwise necessitate duplicative or conflicting environmental review. How else are we to interpret statements such as those of

the courts in, for example, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C.Cir. 1973):

> "We add, finally, a word of clarification: we establish a narrow exemption from NEPA, for EPA determinations under Section 111 of the Clean Air Act. NEPA must be accorded full vitality as to non-environmental agencies as established by our outstanding precedents."

Or, similarly, in *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973), discussed in our Petition at 10-11.

Petitioner does not agree that it is dicta when a court expressly defines the limits of its holding (i.e., the scope of a narrow exception). Regardless, the Second Circuit's opinion in this case is the first to apply functional compliance to an agency other than the EPA and without any express statutory conflict with NEPA. It creates a clear conflict with other circuits, and, if followed, would virtually gut the procedural requirements of NEPA. Moreover, that respondents can argue at all that the "policy" limiting functional compliance to the EPA does not have the force of law cries out for this court's intervention. To leave this dangerous precedent in place would be to ignore the unambiguous statutory mandate from Congress which requires agency compliance with NEPA to the fullest extent possible.

Respondents further argue that NEPA compliance was unnecessary in the rulemaking under review here because "an agency's promulgation of rules that themselves implement NEPA and determine when an EIS is required, is not subject to the preparation of an EIS." Opposition 18. Petitioner concedes that promulgation of purely procedural rules that implement NEPA may not require environmental assessment, assuming all the CEQ

and NEPA requirements were followed, but that was not the case here. The FCC was not simply promulgating procedural rules implementing NEPA; rather, it promulgated national RF exposure limits, and failed to comply with regulations requiring CEQ approval.

Respondents' reliance on *Heartwood, Inc. v. United States Forest Service*, 230 F.3d 947 (7th Cir. 2000), therefore, is misplaced, and again shows the extent to which this Court's intervention is necessary. In *Heartwood* the court affirmed Forest Service ("FS") procedural regulations determining what actions under its rulemaking jurisdiction qualify for a categorical exclusion ("CE") from additional NEPA review under CEQ regulations. *Id.* at 955. Moreover, the FS was found to have complied with the requirement of obtaining CEQ approval for the proposed revisions to its procedural regulations regarding CE's, as required by 40 CFR § 1507.3. *Id.* at 954-955; *see also* 950-951, ns. 2, 4. In the instant case, not only are the regulations at issue substantive rather than procedural, the record is silent regarding any such CEQ approval for the FCC.

As stated, however, the very fact of the government's assertion of *Heartwood* as controlling places into striking relief the necessity for this court to settle the limits of the functional compliance doctrine, lest this exception, should the opinion below stand, swallow the rule.

2. UNCONSTITUTIONAL DELEGATION. In opposition to petitioner's claim that the Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56, § 704(b) (hereafter, "TCA"), constitutes an unlawful delegation of authority by Congress, Petition 18-22, respondents assert, first, that the claim was not decided below, and second, that

authority is to be found not in the TCA but in the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.* (hereafter, "1934 Act"). Opposition at 19-22.

Regarding the first point, the issue was fully briefed in the Court of Appeals. See Brief for Cellular Phone Taskforce at 30-33 and Brief for Respondents at 44-45. That it was not specifically discussed in the Court of Appeals' Opinion does not mean it was not decided, but rather that it must have been included within the lower court's catch-all disposition: "We have considered petitioners' remaining constitutional arguments and find them to be without merit." *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96-97 (2d Cir. 2000).

Regarding respondents' reliance on the 1934 Act as the source of the FCC's authority, rather than the TCA, the 1934 Act is similarly devoid of any intelligible principle to guide the FCC's rulemaking involving national health and safety standards. For example, respondents cite 47 U.S.C. §§ 307(a) and 309(a) as giving broad authority to "issue[ ] licenses to use the electromagnetic spectrum" with the public interest standard as the guiding principle for licensing and the concerns related thereto. Opposition 20. But respondents, elsewhere in their opposition, claim that the potential health effects of RF fields were unknown in 1934, Opposition 24, n.13, and none of the sections relied upon by respondents has been substantively amended since the 1930's (except § 309(j), added in 1993). Furthermore, the FCC's claim of authority stretching back to the 1930's is belied by their own disavowal of such authority much more recently than that:

> "The Commission's position is that it has neither the responsibility nor the authority to

establish health and safety radiation standards." Notice of Inquiry, Gen. Docket No. 79-144, 72 FCC 2d 482 (1979), ¶ 20.

All of the sections of the 1934 Act relied on by respondents, Opposition 20-21, have to do with engineering and promoting nationwide communications, not with health matters. Moreover, respondents' continued reliance on half-century-old cases, the most recent of which, *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943), arose in the days when radio was flourishing, television was in its infancy, and cellular communications resided, if anywhere, in the annals of science fiction, highlights the need for certiorari to be granted in this case if otherwise the FCC will continue such unchecked expansion of its authority under the 1934 Act.

3. NEPA/APA CONSULTATION. The government continues to claim that the FCC's initial consultation with health-related agencies excused it from having to affirmatively seek their comment on the flood of new materials regarding the non-thermal biological effects of RF radiation on the reconsideration round. Opposition at 22-24. This is tantamount to asserting that a snapshot rather than a motion picture would adequately convey the experience of rafting through the Grand Canyon on the Colorado River. It is also contrary to law.

The FCC first promulgated guidelines on RF exposure caused by its licensees in 1985. The rulemaking at issue in this case began in 1993 as the FCC's attempt to update those guidelines. Those guidelines needed to be updated to respond to the rapid rate of change both in the devices using RF and to other scientific developments relating to RF exposure. Clearly, if this were a static field,

the guidelines would not have needed revision. Similarly, if this were a static field, there would have been no need for additional consultation with the health and safety agencies during reconsideration, three years later.

Respondents, however, continue to assert that "the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies", Opposition 22-23, while ignoring the critical issue of the three year lag time after the majority of the consultation occurred. The failure to consult regarding the thousands of pages of additional information and new studies received between 1993 and 1997 is like the snapshot from the Colorado – it is simply insufficient to depict reality.

Similarly, the validity of respondents' reliance on the adequacy and timeliness of the ANSI and NCRP reviews of the scientific literature, Opposition 22, is belied by the record below. The NCRP guidelines state that "A response by an organism to RFEM radiation may have a thermal basis, an athermal basis, or a combined basis." Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields, NCRP Report No. 86 (1986), p. 276, Joint Appendix (below, "JA") 304. And the EPA, in their comments to the initial FCC proposals, warned, "The thesis that the 1992 ANSI/IEEE recommendations are protective of all mechanisms of interaction is unwarranted because the adverse effects level in the 1992 ANSI/IEEE standard is based on a thermal effect." Comments of EPA, Nov. 9, 1993, p. 3, JA 439. So, again, by 1996, the scientific scenery had so shifted, as exemplified by the thousands of pages of new material submitted into the record after 1993, that this reliance on pre-1993 reviews of literature borders on the ludicrous, and fails to

qualify as rational rulemaking as required by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* The irrationality of the rulemaking is compounded by the fact that most of the research relied upon by ANSI pre-dated December 1985, the cut-off date ANSI used for developing its 1992 standards, which the FCC later relied upon for its 1996 rules. IEEE Standard of Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz (1992), at 26, JA 356.

Respondents claim that petitioner does not challenge the Second Circuit's finding that "the FCC 'could reasonably expect [the health and safety] agencies to keep abreast of scientific developments' and 'expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration.' " Opposition at 23, n.12. Not so. If that were so, there would have been no reason for petitioner to present Question 2 in its Petition. If the evidence in the record supported that the health and safety agencies had actually evaluated the recent research in the record, Question 2 would be moot. Petitioner does not dispute that the FCC did consult with the expert agencies regarding the content of its proposed rule. But no evidence in the records suggests that the health and safety agencies ever evaluated, or were even aware of, the content of the public submissions into the FCC's rulemaking docket, either in the first instance or on reconsideration. Indeed, the record reveals the opposite to be true. In the May 19, 1999 letter from the EPA's senior scientist on RF radiation, Norbert Hankin, to Arthur Firstenberg, Mr. Hankin states that, to his knowledge, "the FCC has not asked EPA to review and evaluate any of the materials in the FCC's

docket ET-93-62, other than the April 1993 Notice of Proposed Rulemaking. . . . "[1]

Respondents' reliance on *Wisconsin v. Weinburger*, 745 F.2d 412 (7th Cir. 1984), Opposition 23, is misplaced. The FCC says the picture was not seriously different, but their answer is based on information that was at least three years old in a rapidly changing scientific environment. Many of the studies submitted to the FCC called into question the propriety of ignoring the potentially significant non-thermal damage and the validity of the threshold limits for thermal damage in biological systems. This directly called into question the fundamental scientific understanding underlying the ANSI and NCRP standards, and therefore presented a seriously different picture. *Id.* at 420. For respondents to say, therefore, that it was reasonable to continue to rely on the "fundamental scientific understanding underlying the ANSI and NCRP standards" absent new scientific evidence that they were invalid, Opposition at 23, bootstraps the question into the conclusion. The FCC is saying that it does not have to review the literature suggesting that those standards are wrong, or send it to the knowledgeable agencies for review, because no one has shown (except, of course, in the very literature being ignored) that the standards are no longer valid.

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[1] The letter is reproduced, with errors, in the appendix of David Fichtenberg's *pro se* Petition in No. 00-407, at 45. Although two lines of text were omitted and there were other typographical errors, the relevant substance of the letter as reproduced there is adequate for present purposes. The letter was submitted to the Court of Appeals in response to the Rule 28(j) submission of the FCC, cited in the Opposition Brief at 23-24, n.12.

The FCC's failure, both in the first instance and on reconsideration, to "rationally consider the relevant evidence", *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1217 (D.C. Cir. 1983), by failing to present the new data for evaluation by the agencies with health and safety expertise, constituted a blatant violation of the APA and NEPA.

4. REHABILITATION ACT. Respondents contend that the FCC rulemaking did not constitute discrimination against electrically sensitive people under any "program or activity" of the FCC, and therefore the improper handling of Petitioner's Rehabilitation Act ("RA") complaint and the FCC rules were not in violation of the RA. Opposition at 24-25; Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* This argument was adopted by the court below in its opinion on rehearing. *Cellular Phone Taskforce v. FCC*, 217 F.3d. 72, 72-74 (2d Cir. 2000).[2]

The opinion below is in direct conflict with other circuits which have ruled on the merits of discrimination allegations arising from federal agency rulemaking, e.g., *Simms v. NHTSA*, 45 F.3d 999, 1009-1010 (6th Cir. 1995), and other cases cited by *amici* the Disability Council of the White Mountains, *et al.* in their brief at 9-10. To reach the merits in each of those cases, the courts had to have accepted that agency rulemaking constitutes a "program or activity" under the Rehabilitation Act. Similarly, this court, in *Traynor v. Turnage*, 485 U.S. 535, 541-545, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988), appears to take for granted that federal agency rulemaking constitutes a

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[2] Petitioner erred in stating in its petition, at 1, that the opinion on rehearing was unpublished.

"program or activity" under the RA. Thus, there is a clear conflict with the decisions below in this case.

Moreover, respondents continue their misplaced reliance on *Community Television of So. Cal. v. Gottfried*, 459 U.S. 498, 500, 103 S.Ct. 885, 74 L.Ed.2d 705 (1983) and *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 92 (D.C. Cir. 1988). Opposition 25. The issue in those cases was the application of the RA to discrimination by FCC *licensees*. Those cases did not involve allegations of discrimination by the FCC.

Respectfully submitted,

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